

THE STATE OF NEW HAMPSHIRE

**HILLSBOROUGH, SS.
SOUTHERN DISTRICT**

**SUPERIOR COURT
No. 05-E-0406**

Londonderry School District SAU #12
Merrimack School District SAU #26 and
New Hampshire Communities for Adequate Funding of Education

v.

State of New Hampshire

ORDER

This is a Petition for a Declaratory Judgment by two (2) school districts and a non-profit organization, consisting of nineteen (19) School Administrative Units and towns, against the State of New Hampshire seeking a determination that RSA 76:3 and RSA Chapter 198, as amended by House Bill 616 ("HB 616"), together with certain other statutes relating to education, all of which serve to implement the State's duty to provide a constitutionally adequate education, violate the New Hampshire Constitution. The petitioners have filed a Motion for Summary Judgment. The respondent objects. For the reasons set forth herein, the Court GRANTS the petitioners' motion and finds that the statutes, as amended by HB 616, are unconstitutional.

Background

Prior to the enactment of HB 616, RSA 76:3 provided for a State Education Property Tax and RSA 198:38 through RSA 198:49, in general, provided for an education trust fund, for the determination of the cost of an adequate education, and for the determination and distribution of adequate education grants. These statutes were enacted by the Legislature in order to fund the State's obligation to provide a

constitutionally adequate public education for its citizens in accordance with the New Hampshire Supreme Court's decisions in Claremont School Dist. v. Governor, 138 N.H. 183 (1993) (hereinafter Claremont I), and Claremont School District v. Governor, 142 N.H. 462 (1997) (hereinafter Claremont II).

The petitioners claim that HB 616 is unconstitutional on its face because it: (1) fails to define, cost out, and ensure delivery of a constitutionally adequate education; (2) requires a number of municipalities to fund a constitutionally adequate education through their local taxes; (3) all but eliminates so-called "donor communities" and imposes an unreasonable and disproportionate tax burden on "property-poor" municipalities with respect to the funding of education; and (4) creates a classification of former "donor communities" that retain all the revenue they raise through the statewide enhanced education tax resulting in a violation of equal protection.

For the applicable law in this case, the Court need look no further than the decisions of the New Hampshire Supreme Court in Claremont I and its progeny. In accordance with these decisions, the Court must determine whether HB 616 meets the State's duty to provide a constitutionally adequate public education to New Hampshire children. In doing so, it will not be necessary for the Court to determine what that duty is or what State obligations are encompassed by the duty, as the Supreme Court has already done so.

In Claremont I, the Supreme Court held "that part II, article 83 [of the

New Hampshire Constitution] imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding." 138 N.H. at 184. Subsequently, in Claremont II, the Supreme Court held "that the property tax levied to fund education is, by virtue of the State's duty to provide a constitutionally adequate public education, a State tax and as such is disproportionate and unreasonable in violation of part II, article 5 of the New Hampshire Constitution." 142 N.H. at 466. The Supreme Court stated that "[t]o the extent that the property tax is used in the future to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State." Id. at 471. The Court reiterated that "[t]he responsibility for ensuring the provision of an adequate public education and an adequate level of resources for all students in New Hampshire lies with the State." Id. at 475-76.

Standard of Review

Generally, the Court's review of whether a legislative act is unconstitutional, "is premised on the rule that [t]he constitutionality of a legislative act is to be presumed, and a statute is not to be held unconstitutional unless a clear and substantial conflict exist[s] between it and the constitution." Petition of Governor and Executive Council, 151 N.H. 1, 4 (2004) (quotations and citations omitted). A statute "will not be declared invalid except upon [i]nescapable grounds." Id. (quotation and citation omitted).

However, the New Hampshire Supreme Court has determined that "a

constitutionally adequate public education is a fundamental right.” Claremont II, 142 N.H. at 473. “[T]he right to an adequate education mandated by the constitution is not based on the exclusive needs of a particular individual, but rather is a right held by the public to enforce the State's duty.” Id. (quotation and citation omitted). “When governmental action impinges fundamental rights, such matters are entitled to review under the standard of strict judicial scrutiny.” Id. at 472. Under this standard, the Court must find “a compelling state interest to sustain the legislation.” Id. (quotation and citation omitted).

The State argues that strict scrutiny is not the proper standard of review to apply in this case and urges the Court to apply the presumption of constitutionality standard of review. The State maintains that the strict scrutiny standard does not apply because the petitioners have failed to offer any evidence that governmental action has impinged the public’s fundamental right to a constitutionally adequate education. The Court is not persuaded by this argument. This case does not involve, as the State suggests, a determination of the constitutionality of a statute due to the legislative process involved in its enactment. See Baines v. N.H. Senate President, 152 N.H. 124 (2005); Hughes v. Speaker, N.H. House of Representatives, 152 N.H. 276 (2005). Rather, in this case the petitioners claim that HB 616, which serves to implement the public’s fundamental right to an adequate education, does, in fact, impinge that right. Thus, the Court finds and rules that the strict scrutiny standard applies in this case, and, as a result, the State must satisfy the heightened standard of review of strict scrutiny.

In ruling on a motion for summary judgment, the Court must “construe the pleadings, discovery and affidavits in the light most favorable to the non-moving party to determine whether the proponent has established the absence of a dispute over any material fact and the right to judgment as a matter of law.” See Panciocco v. Lawyers Title Ins. Corp., 147 N.H. 610, 613 (2002) (citation omitted); see also Wong v. Ekberg, 148 N.H. 369, 375 (2002) (citation omitted). In order to prevail, the moving party must “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” RSA 491:8-a, III (1997). A fact is material “if it affects the outcome of the litigation under the applicable substantive law.” Palmer v. Nan King Restaurant, Inc., 147 N.H. 681, 683 (2002) (citation omitted). “The party objecting to a motion for summary judgment may not rest upon mere allegations or denials of [its] pleadings, but [its] response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue [of material fact] for trial.” Panciocco, 147 N.H. at 613 (citing RSA 491:8-a, IV (1997)).

The petitioner is challenging the constitutionality of the statute on its face but also relies on certain New Hampshire Department of Education publications, a publication by the New Hampshire Attorney General's Office, and transcripts of legislative debate on the statute in support of its position that HB 616 is unconstitutional. In support of its Objection to the Petitioners’ Motion for Summary Judgment, the State has provided a copy of an article by Richard Briffault of Columbia Law School entitled “The Relationship

between Adequacy and Equity,” affidavits of Lyonel Tracy, Commissioner of the Department of Education (“Mr. Tracy”), and of G. Phillip Blatsos, Commissioner of the Department of Revenue Administration (“Mr. Blatsos”), a portion of the State of New Hampshire Comprehensive Annual Financial Report for the Fiscal Year ending June 30, 2004, and the Department of Administrative Services, State of New Hampshire Monthly Revenue Focus for June 2005. When considering all of the evidence submitted in the light most favorable to the respondent in this case, the Court finds that there are no genuine issues of material facts in dispute, and thus, that the petitioners are entitled to judgment as a matter of law.

Analysis

Adequate Education

Preliminarily, the Court addresses the State’s complaint that the petitioners, in their Memorandum of Law in Support of their Motion for Summary Judgment, raise issues which were not raised in their original Petition for Declaratory Judgment. The State argues that “[t]he Petition is limited to a challenge to the constitutionality of HB 616, an education funding law which is only one part of the entire system created over time to deliver an adequate education. HB 616 modified the adequacy aid formula - it did not purport to change the definition of adequate education or tinker with the accountability system already in place.” State’s Obj. to Pet’r’s Mot. for Summ. J., at p. 7 (emphasis in original). The Court disagrees.

In their Petition, the petitioners clearly raise the claim that "HB 616 is unconstitutional because it fails to define, cost out and ensure delivery of an adequate education." Pet'r's Pet. for Declaratory J., at p. 7. The petitioners reference other statutes which address the definition of a constitutionally adequate education, the education standards, assessment program, and enforcement for non-complying school systems. The Petition fully sets out the petitioners' arguments as to why the State has failed to satisfy these essential components of its duty to provide a constitutionally adequate education. Thus, the State cannot claim to be "surprised" by the petitioners' claims in its Motion for Summary Judgment. A reasonable reading of the petitioners' original Petition makes clear their claim that the present statutory framework providing for a constitutionally adequate education, as amended by HB 616, fails to fulfill all the essential components of the State's duty to provide a constitutionally adequate education to the children of this State, as expressly delineated by the Supreme Court in its many decisions over the last ten (10) years.

In their Motion for Summary Judgment, the petitioners claim that they are entitled to judgment as a matter of law because the applicable school funding statutes, as amended by HB 616, are unconstitutional. The petitioners argue that HB 616 fails to fulfill the State's duty to provide a constitutionally adequate education as that duty has been delineated by the Supreme Court. Specifically, as noted above, the petitioners argue that the statute, as amended, fails to define, cost out, and ensure delivery of a constitutionally adequate education.

Definition of Adequate Education

The petitioners claim that neither HB 616 nor any other statute relating to the State's duty to provide a constitutionally adequate education define a constitutionally adequate education as mandated by the New Hampshire Supreme Court. In Claremont School District v. Governor (Accountability), 147 N.H. 499, 505 (2002), the Supreme Court adopted the State's assertion that Claremont II issued "four mandates: define an adequate education, determine the cost, fund it with constitutional taxes, and ensure its delivery through accountability." (quotations omitted). These four mandates collectively constitute the State's duty to provide a constitutionally adequate public education. Here, the State appears to argue that its duty is simply to provide a constitutionally adequate education and to guarantee adequate funding and that it has done so by providing "a complete and comprehensive system of delivering education." State's Obj. to Pet'r's Mot. for Summ. J., at p. 7, fn. 3. However, the Supreme Court has made it clear in its decisions that the State's duty is not merely to provide and fund a constitutionally adequate education but that it must meet all of these four mandates as each one is an integral part of the duty of the State to provide a constitutionally adequate education. See generally Claremont School District v. Governor (Accountability), supra.

"It is not possible to determine the level of funding required to provide the children of this state with a constitutionally adequate education until its essential elements have been identified and defined." Opinion of the Justices (Reformed Public

School Financing Systems), 145 N.H. 474, 478 (2000). The Supreme Court has consistently made clear that defining and implementing a constitutionally adequate education are an integral part of the State's duty. See Claremont I, 138 N.H. at 192-93; Claremont II, 142 N.H. at 475; Claremont School Dist. v. Governor (Motion for Extension of Deadlines), 143 N.H. 154, 159-61 (1998); Claremont School Dist. v. Governor (Accountability), 147 N.H. at 508, 519-20 (2002). "[T]he parameters of the education mandated by the constitution ... is, in the first instance, for the [L]egislature and the Governor." Claremont I, 138 N.H. at 192; see also Claremont II, 142 N.H. at 472 (stating "in the first instance, it is the [L]egislature's obligation ... to establish educational standards that comply with constitutional requirements"); Opinion of the Justices (Reformed Public School Financing Systems), 145 N.H. at 478 (stating "the content of a constitutionally adequate education must be defined, in the first instance, by the [L]egislature"). Thus, the Supreme Court has clearly placed the responsibility to define a constitutionally adequate education on the Legislature and the Governor.

The State asserts that it has defined an adequate education in RSA 193-E:2. However, the seven criteria set forth in RSA 193-E:2 (Supp. 2005) are no more than a restatement of the criteria articulated by the Supreme Court of Kentucky as cited by the New Hampshire Supreme Court in Claremont II, supra. In Claremont II, the Supreme Court indicated that it viewed "these guidelines as benchmarks of a constitutionally adequate public education." 142 N.H. at 475. However, the Supreme Court further specified that it "anticipate[d] that [the Legislature] w[ould] promptly develop and adopt

specific criteria implementing these guidelines, and in completing this task, w[ould] appeal to a broad constituency." Id. Thus, the Supreme Court established that the State could not fulfill its duty by merely enacting such guidelines. "While the judiciary has the duty to construe and interpret the word 'education' by providing broad constitutional guidelines, the Legislature is obligated to give specific substantive content to the word and to the program it deems necessary to provide that 'education' within the broad guidelines." Id. (quotation and citation omitted).

By its own admission, the Legislature has failed to fulfill this obligation. While the Court declined in Claremont School Dist. v. Governor (Motion for Extension of Deadlines) to determine whether the definition of an adequate education adopted by the State was facially constitutional, it did so because the State conceded, "that it has not completed its efforts to define and implement a constitutionally adequate education as required by Claremont II." 143 N.H. at 160 (emphasis added).

Based on the foregoing, it is clear that the Supreme Court has determined that the duty to define a constitutionally adequate education requires more than merely establishing "aspirational guidelines." Claremont II, 142 N.H. at 474. Since the passage of RSA 193-E:2 in 1998, and despite the representation by the State to the Supreme Court in Claremont II, supra that it was continuing to define and implement a constitutionally adequate education, the Legislature has completely failed to fulfill its constitutional duty and "adopt specific criteria implementing the[] guidelines" as required by the Supreme Court. Id. at 475.

Determination of the Cost of an Adequate Education

One of the four mandates of the State's duty to provide a constitutionally adequate education is to determine the cost of an adequate education. As previously set forth herein, the Supreme Court has made it clear in its opinions that the State must meet these four mandates as they are an integral part of the duty of the State to provide a constitutionally adequate education. See generally Claremont School District v. Governor (Accountability), *supra*. In order for the State to fulfill its duty to provide a constitutionally adequate education, the Legislature must, in addition to specifically and substantially defining an adequate education, provide a reasonable method to determine what an adequate education will cost.

The Court recognizes, as did Justice Horton, in his dissent in Claremont II, that

'Constitutional adequacy' is not 'general adequacy.' The former must be determined by a careful reading of our constitution. The latter may be important to the maker's of policy, but it is clear that one man's adequacy is another's deficiency. Under our system of government, the elected representatives of the people must strike the balance.

Claremont II, 142 N.H. at 478 (Horton, J. dissenting). Intelligent men and women may certainly differ as to what constitutes an adequate education and how to determine its cost, and there is undoubtedly a wide spectrum of such definitions which result in an equally wide spectrum of methods to determine its cost.

As noted above, the Supreme Court has repeatedly acknowledged that it is the prerogative of the Legislature and the Executive Branch to develop the criteria for an adequate education, to provide a determination of its cost, to determine the mechanism

of funding and to establish accountability. "The [L]egislature and the Governor have broad latitude to fashion the specifics. Once this critical task had been completed, it is for the [L]egislature to adopt a funding mechanism to ensure that a constitutionally adequate education is provided." Opinion of the Justices (Reformed Public School Financing System), 145 N.H. at 478.

The Supreme Court has clearly indicated "that constitutional adequacy [does not] require[] a uniform expenditure per pupil throughout the State." Id. In fact, the Court has conceded that "the cost of a constitutionally adequate education may not be the same in each school district." Id. (citation omitted). The Supreme Court has "never directed or required the selection of a particular funding mechanism." Id. However, while "there are many different ways that the Legislature could fashion an educational system while still meeting the mandates of the constitution," Claremont School Dist. v. Governor (Accountability), 147 N.H. at 518 (quotation omitted), whichever way the State chooses, the Supreme Court has ruled that the State has a duty to provide a constitutionally adequate education, and one of the essential components of that duty is to determine the cost of an adequate education as defined by the Legislature. While great latitude must be granted to the Legislature to develop a formula or methodology to compute that cost, it must fulfill its duty by, in fact, determining the cost in accordance with its definition of an adequate education. The Court finds and rules that in HB 616, the Legislature has abdicated its duty.

Prior to the enactment of HB 616, RSA 198:38 through 198:49 was entitled "State Aid for Educational Adequacy; Education Trust Fund." RSA 198:40 provided for a determination of per pupil adequate education costs and adequate education grants by means of a complex formula which in essence considered, among other factors, certain educational costs in certain school districts and average daily membership in attendance. See also HB 616, ¶ 1. The statewide cost of an adequate education per pupil was determined in accordance with the formula, and adequate education grants to municipalities were determined using the average cost per pupil and the weighted average daily membership in residence for the municipality, plus other adjustments. RSA 198:40. The education grants were funded by an education property tax as enumerated in RSA 76:3, and a State grant from other sources. If the amount raised in a municipality by the state education property tax exceeded a municipality's cost of an adequate education, the excess was remitted to the State, and was used to fund grants to those municipalities in which the state education property tax failed to provide a sufficient amount to fund the cost of an adequate education. See RSA 198:46. The cost of an adequate education for future years was determined by applying an inflation factor to the adequate education cost per pupil determined for the first year.

HB 616 repealed RSA 198:40, and replaced it with RSA 198:40-a, b, and c, which provide for "Local Tax Capacity Aid," "Targeted Per Pupil Aid," and "Statewide Enhanced Education Tax Capacity Aid," respectively. These three aid grants constitute the total education grant for each municipality. Each type of aid is calculated differently

and all towns do not receive all types of aid under the eligibility requirements for each component. See RSA 198:40-a (Supp.2005); RSA 198:40-b (Supp. 2005); RSA 198:40-c (Supp. 2005). Aid is limited to those municipalities with the greatest "need." See RSA 198:40-a, b, c. The Legislature has determined "need" based on a municipality's ability to raise revenue for its schools. See id. This is measured by the municipality's equalized valuation per pupil. See id.

A municipality receives local tax capacity aid if its local equalized valuation per pupil, including utilities, is less than the statewide average equalized valuation per pupil. RSA 198:40-a, III(b) (Supp. 2005). Targeted aid provides aid for educationally disabled students, students eligible for free or reduced-price meals, students with a limited proficiency in English, and for transportation costs. RSA 198:40-b, I (Supp. 2005). A municipality qualifies for targeted aid if the local equalized valuation including utilities per pupil is less than or equal to 150 percent of the statewide average equalized valuation per pupil, and the municipality's median family income is less than or equal to 150 percent of the State average median family income. Id. Statewide enhanced education tax capacity aid is determined by a formula similar to the formula used to determine local tax capacity aid. RSA 198:40-c, III(b) (Supp. 2005). However, aid is restricted to those municipalities having an equalized valuation per pupil, excluding utilities, that is below the statewide average equalized valuation per pupil. Id. The total education grant is determined solely on the basis of equalized property valuation and, with regard to targeted aid, median family income. RSA 198:41, I (Supp. 2005).

The statute no longer provides for a calculation of the cost of an adequate education, per pupil or otherwise. Rather, RSA 76:3 has been amended to provide for a Statewide Enhanced Education Tax ("SEET") to be set at a level sufficient to generate revenue of \$363,000,000. RSA 76:3 (Supp. 2005). There is no provision for any increase in this revenue for subsequent years. As under the prior statute, an education trust fund is created into which the proceeds of various State taxes and funds are deposited. RSA 198:39, I (Supp. 2005). The education trust funds are to be used only for education grants to municipalities under RSA 198:42. Id. If the SEET to be raised by a municipality exceeds the amount the municipality spent for schools from both the state and local education property tax for fiscal year 2003, the municipality must remit the excess to the State. See RSA 198:41, II (Supp. 2005) and RSA 198:46, I (Supp. 2005). The total amount of State revenue to be used for education for fiscal year 2006 including SEET is approximately \$837 million. See Pet'r's Mem. of Law in Supp. of Their Mot. for Summ. J., at p. 1.

HB 616 arbitrarily establishes an amount to be dedicated to providing an adequate education. It does not establish in any rational way what an adequate education, as the Legislature reasonably defines it, will cost. It merely provides what it terms an "equitable" manner in which to distribute the funding to municipalities that is essentially based solely on the equalized valuation of each municipality. In other words, the "equitable manner" is based upon each municipality's ability, or lack thereof, to raise sufficient funds through its property tax to provide an adequate education for its

children. However, the distribution of funds to each municipality, no matter how equitably it is accomplished, does not in any way ensure that an adequate education is provided. The Supreme Court has noted that “[t]he constitution mandates statewide adequacy — not statewide equality.” Opinion of the Justices (Reformed Public School Financing System), 145 N.H. at 478.

The Legislature has made no provision whatsoever in HB 616 to determine the cost of an adequate education. Rather, it has arbitrarily set the amount which it is willing to dedicate to the task of providing an adequate education. The State argues that through HB 616 it “has established a mechanism for paying for the constitutionally adequate education that Claremont II mandates.” State’s Obj. to Pet’r’s Mot. for Summ. J., at p. 9 (emphasis in original). However, the duty imposed on the Legislature by the Constitution is not merely to establish a mechanism for supporting the cost of a constitutionally adequate education but to actually determine the cost of an adequate education. See Claremont School District v. Governor (Accountability), 147 N.H. at 505. The Supreme Court has made clear that the State’s duty is to totally fund “a constitutionally adequate education to every educable child.” Opinion of the Justices (Reformed Public School Financing System), 145 N.H. at 477-78 (citations omitted) (emphasis in original).

By failing to determine the cost of an adequate education, the Court is unable to determine whether the State’s duty is met no matter how much it appropriates. Given that the State has failed to determine the cost of an adequate education, it is not

possible to determine whether the amount provided by the State to each municipality is sufficient to totally fund an adequate education in the respective municipality. It is not for the municipality to determine whether the amount allocated is sufficient to totally fund an adequate education. "Part II, Article 83 [of the New Hampshire Constitution] ... imposes upon the State the exclusive obligation to fund a constitutionally adequate education. The State may not shift any of this constitutional responsibility to local communities" Opinion of the Justices (Reformed Public School Financing), 145 N.H. at 476.

As discussed above, the duty to provide an adequate education imposed by our Constitution is defined by its essential components as expressed by the Supreme Court. If the State fails to provide these essential components to the level of its constitutional duty, it has failed to fulfill its duty. If the State is permitted to determine the cost of an adequate education simply by arbitrarily allocating an amount of funds it is willing to provide to fulfill that duty, "the duty creates no obligation, and is no longer a duty." Claremont School Dist. v. Governor, (Accountability), 147 N.H. at 509 (citation omitted).

The Court notes that the State has failed to fulfill its duty to determine the cost of an adequate education not because it has chosen to label its State grants "Equitable Grants" rather than "Adequacy Grants," or because it has chosen not to define an adequate education on a per pupil basis, or even because it may determine that an adequate education costs less than it may have determined in the past. Arguably, there are numerous constitutionally valid methods of determining the cost of an adequate

education, all of which may result in different amounts. However, the State has failed in its duty because it has failed to determine in any meaningful way the cost of an adequate education. As a result, it cannot be established that the State is fulfilling its duty to provide the total cost of a constitutionally adequate education to every municipality in the State.

Accountability

In Claremont School Dist. v. Governor (Accountability), *supra* the Supreme Court specifically held that accountability is an essential component of the State's duty to provide a constitutionally adequate public education. 147 N.H. at 500.

Accountability means that the State must provide a definition of a constitutionally adequate education, the definition must have standards, and the standards must be subject to meaningful application so that it is possible to determine whether, in delegating its obligation to provide a constitutionally adequate education, the State has fulfilled its duty.

Id. at 508 (citation omitted). The Supreme Court reasoned that “[i]f the State, cannot be held accountable for fulfilling its duty, the duty creates no obligation and is no longer a duty.” Id. at 509 (citation omitted).

The Supreme Court found that the existing statutes, regulations and rules, which the State argued satisfied the duty of accountability, were insufficient. Id. at 510-18. As evidence that the State had satisfied its duty of accountability, the State proffered RSA 193-E:2; N.H. ADMINISTRATIVE RULES, Ed ch. 300 (the State's minimum standards for education); and RSA Chapter 193-C (1999) (the New Hampshire Education Improvement and Assessment Program). See id. at 510. The Supreme Court did not

find that the standards or programs themselves were insufficient in content but that by virtue of specific provisions contained within the statutes, regulations, and rules, they failed to provide sufficient standards for accountability. See id. at 510-19.

With respect to the minimum standards proffered by the State, the Supreme Court held that to the extent such standards excused noncompliance, they were unconstitutional. See id. at 514. Under RSA 194:23, III (1999), a "high school" shall "[c]omply with standards prescribed by the state board of education which shall be uniform in their application to all schools." These standards are the minimum standards adopted by the Board of Education. See Claremont School Dist. v. Governor (Accountability), 147 N.H. at 511-12. RSA 194:23-c (1999) provided that "the state board of education shall have the power to approve for a reasonable period of time a high school that does not fully meet the requirements of 194:23 if in its judgment the financial condition of the school district or other circumstances warrant delay in full compliance."

The Supreme Court held that:

On their face, RSA 194:23-c and N.H. ADMIN. RULES, Ed 306.41(a) permit a school district to provide less than an adequate education as measured by these minimum standards when the local tax base cannot supply sufficient funds to meet the standards. The statute and the rule also permit noncompliance with the standards under emergency conditions, such as a fire or natural disaster. While it may be permissible to excuse noncompliance under emergency conditions, the statute permits the board of education to also approve a school that does not meet the minimum standards based solely on the 'financial condition of the school district.'

Excused noncompliance with the minimum standards for financial reasons alone directly conflicts with the constitutional command that the State must guarantee sufficient funding to ensure that school districts can provide a constitutionally adequate education.

...

There is no accountability when the rules on their face tolerate noncompliance with the duty to provide a constitutionally adequate education. While the State may delegate this duty, it must do so in a manner that does not abdicate the constitutional duty it owes to the people. The State's duty cannot be relieved by the constraints of a school district's tax base or other financial condition.

...

[T]herefore, ... to the extent the minimum standards for school approval excuse compliance solely based on financial conditions, it is facially insufficient because it is in clear conflict with the State's duty to provide a constitutionally adequate education.

Claremont School Dist. v. Governor (Accountability), 147 N.H. at 513-14 (internal citations omitted).

Further, the Supreme Court found that the New Hampshire Education Improvement and Assessment Program ("NHEIAP") did not fulfill the State's constitutional duty under Part II, Article 83. Id. at 517. Under RSA Chapter 193-C,

[t]he goals of the [New Hampshire Education Improvement and Assessment Program] [] are to define what students should know and be able to do, develop and implement methods for assessing that learning and its application, report assessment results to all citizens of New Hampshire, help to provide accountability at all levels, and use the results, at both the State and local levels, to improve instruction and advance student learning.

Id. at 514 (citing RSA 193-C:3, I (a)-(e)). According to the Department of Education pamphlet, NHEIAP was "the cornerstone of the state's initiatives to continuously

improve education for all students.” Id. The statute directed the Department of Education to develop a program consisting of three components. See id. The first component provided for curriculum frameworks, the second component established a statewide assessment program, and the final component was a local education improvement and assessment plan for individual school districts. See id. at 514-15. “The statute specifically states that one of [t]he aims of this program shall be to . . . [h]elp to provide accountability at all levels . . . [and] accordingly, is intended to serve[] as an effective measure of accountability.” Id. at 516 (citing RSA 193-C:3, I and 193-C:1, II).

However, under RSA 193-C:9, I, “no school district is required to respond to the assessment results; rather [e]ach school district in New Hampshire is encouraged to develop a local education improvement and assessment plan.” Id. at 517 (emphasis in original). The Supreme Court recognized that

[t]his means that even if the assessment results show that all the students in a school are at novice level, neither the school district nor the department of education is required to do anything. Whether an individual school district is providing a constitutionally adequate education or not, it is merely encouraged to develop a local educational improvement plan, and if it opts to do so, the department of education is available to assist. Nothing more is required.

Id.

The Supreme Court then found that

[a]n output-based accountability system that merely encourages local school districts to meet educational standards does not fulfill the State's constitutional duty under Part II, Article 83. While the State may delegate its duty to provide a constitutionally adequate education, the State may not

abdicate its duty in the process. The purpose of meaningful accountability is to ensure that those entrusted with the duty of delivering a constitutionally adequate education are fulfilling that duty. When the State chooses to use an output-based tool to measure whether school districts are providing a constitutionally adequate education, that tool must be meaningfully applied. The department of education cannot meaningfully apply the educational standards and assessment tests set out in RSA chapter 193-C when it cannot hold school districts accountable, but instead is limited to using the results to encourage school districts to develop a local education improvement and assessment plan. To the extent the State relies on RSA chapter 193-C to provide for accountability, it must do more than merely encourage school districts to meet the educational standards that are designed to indicate whether students are receiving a constitutionally adequate education.

Id. at 517-18 (internal citations omitted). Ultimately, the Supreme Court held that as a result of deficiencies determined to exist in the system of statutes, regulations and rules, "the State ha[d] not met its constitutional obligation to develop a system to ensure the delivery of a constitutionally adequate education." Id. at 518.

In this case, the State has provided the Court with an affidavit of Mr. Tracy, Commissioner of the Department of Education, which states, in pertinent part:

The State has a complete and comprehensive system of delivering education which has changed significantly since Claremont School District v. Governor (Accountability), 147 N.H. 499 (2002). The State defined an adequate education in RSA 193-E:2. The State's accountability system includes RSA 21-N, RSA 186, RSA 193-C, RSA 193-H, NH Rules Ed 300, *et. seq.* and all of the rules and regulations affecting schools. And, the delivery system includes the requirements of the Federal law commonly known as 'No Child Left Behind' which requires the State to measure and report adequate yearly progress in each school in New Hampshire which did not become effective until FY03. Schools that do not meet their adequate yearly progress are designated as being in need of improvement and receive special assistance and funding to correct the issues faced by those schools.

Aff. of Lyonel Tracy, at ¶ 4.

While many of the statutes, regulations and rules in existence when the Supreme Court decided Claremont School Dist. v. Governor (Accountability) in 2002 remain unchanged in any material way, the Legislature has amended RSA Chapter 193-C (Supp. 2005) and enacted RSA Chapter 193-H (Supp. 2005) entitled “School Performance and Accountability.” RSA 193-C:9, I has been amended to establish “a local education improvement fund in the state treasury for the purpose of providing assistance to local school districts.” RSA 193-C:9, I (Supp. 2005). RSA 193-H:4 (Supp. 2005) requires a school district which has been designated as being “in need of improvement pursuant to RSA 193-H:3” to respond to assessment results and to take specific action to correct the areas of concern under the supervision of the State Board of Education, and with the assistance of the Department of Education. Under the statute, a school district “in need of improvement” shall develop a plan to address the areas of concern it intends to correct, implement the plan, and establish significant progress in its implementation within one year. RSA 193-H:4, I (Supp. 2005). However, RSA 193-H:2, I (Supp. 2005) further provides that “[o]n or before the 2013-2014 school year, schools shall ensure that all pupils are performing at the basic level or above on the statewide assessment as established in RSA 193-C.” (emphasis added).

Nevertheless, despite the change to RSA 193-C:9, I and the enactment of RSA 193-H, the State has failed to rectify the other specific statutory concern, cited by the Supreme Court in Claremont School Dist. v. Governor (Accountability) which served as one of the reasons the Court determined that the State had failed to meet its

constitutional obligation to deliver an adequate education. RSA 194:23-c remains unchanged. Under that provision the State Board of Education is still permitted to approve a “high school” that does not meet the minimum standards based solely on the financial condition of the school district. Furthermore, newly enacted N.H. ADMINISTRATIVE RULE Ed 306.30 provides, in pertinent part, that “[t]he state board shall grant a delay in full compliance and approve the school for a period of one year if any of the following conditions exist: (1) Reduction in local tax base”

As discussed above, in Claremont School Dist. v. Governor (Accountability) the Supreme Court found that “to the extent the minimum standards for school approval excuse compliance solely based on financial conditions, [RSA 194:23-c] is facially insufficient because it is in clear conflict with the State's duty to provide a constitutionally adequate education.” Id. at 514 (citation omitted). In that sense, nothing has changed since 2002. The statute still permits the State Board of Education to approve a school that does not meet the minimum standards based solely on the financial condition of the school district. Despite the passage of four (4) years from the Supreme Court's decision in Claremont School Dist. v. Governor (Accountability), the Legislature has yet to bring the legislation into compliance with the holding in that case.

Additionally, the Legislature has provided that schools do not have to fully comply with State standards until school year 2013-2014. “Absent extraordinary circumstances, delay in achieving a constitutional system is inexcusable.” Claremont School Dist. V. Governor (Motion for Extension of Deadlines), 143 N.H. at 158. The Court cannot

conceive of any extraordinary circumstances which could possibly permit the Legislature to postpone accountability for another seven (7) to eight (8) years. Accordingly, for the reasons cited by the Supreme Court in Claremont School Dist. v. Governor (Accountability), supra, the existing statutes, regulations, and rules fail to satisfy the requirement of accountability, an essential component of the State's duty to provide a constitutionally adequate education.

Disproportional Taxes

The petitioners argue that HB 616 violates Part II, Article 5 of the New Hampshire Constitution by essentially eliminating “donor communities” which results in some “property poor” communities bearing a disproportional share of educational expenses through local taxes. Thus, according to the petitioners, under HB 616, “property-rich” communities are now permitted to retain all the revenue they raise through the SEET which the petitioners maintain will be in excess of what is needed to support the cost of an adequate education.

In Claremont II, the Supreme Court held that “[t]o the extent that the property tax is used in the future to fund the provision of an adequate education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the State.” Claremont II, 142 N.H. at 471. Subsequently, in Opinion of the Justices (School Financing), 142 N.H. 892 (1998), the Supreme Court addressed the issue of whether a property tax abatement scheme, included in proposed school financing legislation, would violate Part II, Article 5 of the New Hampshire Constitution requiring that all taxes

be proportional and reasonable and whether it would violate the constitutional requirement that the tax be administered in a manner that is equal in valuation and uniform in rate throughout the State. The proposed legislation provided for a “‘special abatement’ for [t]he amount of state education tax apportioned to each town ... in excess of the product of the statewide per pupil cost of an adequate education ... times the average daily membership in residence for the town.” 142 N.H. at 899 (quotation and citation omitted). The ‘special abatement’ was “designed to protect towns from financially contributing to the adequate education of children in other towns or school districts.” Id. at 901.

The Court found that the abatement scheme caused “the effective tax rate [to be] reduced below the uniform State education tax in any town that c[ould] raise more revenue than it need[ed] to provide the legislatively defined ‘adequate education’ for its children.” Id. at 899. As a result, the tax was not uniform in rate because “clearly some taxpayers would pay a far higher tax rate in furtherance of the State’s obligation to fund education than others.” Id. at 902. Thus, the Court held that the “special abatement” scheme violated Part II, Article 5 of the New Hampshire Constitution “and the express language of Claremont II.” Id.

In Claremont School Dist. v. Governor (Statewide Property Tax Phase-In), supra, the Supreme Court considered the constitutionality of a provision for “phasing-in” the statewide property tax. Under this provision, during the first five tax years, each municipality in which the education property tax exceeded the amount necessary to

fund an adequate education, was required to remit an increasing percentage of such excess in each year, beginning at 10 percent of the excess for the first tax year and attaining 100 percent of the excess in tax year 2004. See Claremont School Dist. v. Governor (Statewide Property Tax Phase-In), 144 N.H. at 213. The Court found that “[t]he practical effect of this phase-in is that in fifty ‘property rich’ towns across the State, the full rate ... per thousand is imposed gradually over five years, while taxpayers in the remaining towns pay the full rate immediately.” Id. (citation omitted). The Court held that the phase-in was unconstitutional because it was not justified as a matter of law as an abatement or a tax exemption. Id. at 213-17.

Prior to HB 616, each town received the majority of the total cost of providing an adequate education from the statewide property tax. If the amount raised by that tax exceeded its cost of adequacy, then the municipality remitted the excess statewide property tax revenue to the State to be added to the education trust fund. See RSA 198:39, I(g), :46; see also Pet’r’s Mot. for Summ. J., Ex. 2 at p. 1. If a municipality was not able to raise the full amount of its cost of an adequate education through the statewide property tax, then that municipality received an additional grant from the State. That grant included the excess statewide property tax revenues paid into the fund by the so-called "donor towns" as well as other sources of State funding. See Sirrell v. State, 146 N.H. 364, 367 (2001) (outlining portions of the prior education funding statutory scheme). For example, in the 2000 tax year, while approximately 95 percent of the total amount of the statewide property tax raised was retained by the

municipalities that raised it, the balance, an amount of \$24 million, was placed in the education trust fund, and was used to fund the additional aid sent to the "receiving towns" who were unable to raise the full amount of their cost of an adequate education. See id. at 367-68. The excess proceeds of the statewide property tax comprised approximately 6 percent of the total funds in the education trust fund. See id.

Under HB 616, in addition to grant payments from the State, municipalities turn over to the school district the revenue raised by the statewide enhanced education tax. See Pet'r's Mot. for Summ. J, Ex. 2 at p. 3. The municipalities are not required to remit any of the SEET revenue to the education fund unless the SEET to be raised by the municipality for fiscal year 2006 exceeds the amount taxpayers spent in fiscal year 2003 through the combined payments of state and local educational property taxes. See RSA 198:41, II, :46; see also Pet'r's Mot. for Summ. J, Ex. 2 at p. 3.

For the fiscal year 2006, only Hebron, Jackson, and New Castle were required to remit any of the SEET tax to the Department of Revenue Administration. See Pet'r's Pet. for Declaratory J., Ex. 2. Obviously, none of these towns received any state aid grants for education. See id. All of the remaining towns were permitted to pay over to their school district all the funds raised by SEET. The petitioners have struggled to articulate why such a system results in disproportionate taxation, specifically why it can be said to result in non-uniform tax rates among the municipalities. However, it is clear that a significant amount of the funds raised by SEET in many of the "property-rich"

municipalities would likely exceed the cost of providing a State defined adequate education were the State to determine the cost of an adequate education.

The Court has already determined herein that HB 616 is unconstitutional for failing to determine the cost of an adequate education. HB 616 clearly results in many “property-rich” municipalities retaining SEET proceeds in excess of the cost of an adequate education. The “special abatement” and phase-in provisions of earlier proposed legislation were determined to be unconstitutional because they permitted the municipality to avoid payment of that amount of the statewide education property tax which exceeded the amount necessary to provide an “adequate education.” See Opinion of the Justices (School Financing), 142 N.H. at 902; Claremont School Dist. v. Governor (Statewide Property Tax Phase-In), 144 N.H. at 213. Similarly, under HB 616, the real effect of having the “property-rich” municipalities retain excess SEET proceeds is to permit these municipalities to avoid payment of that amount of the statewide education property tax which exceeds the amount necessary to provide an adequate education for their children. At the same time, “property-poor” municipalities will be required to use the full amount of the statewide enhanced education tax assessment revenues collected to support the cost of an adequate education. Therefore, HB 616 creates a non-uniform tax rate and the Court finds that no constitutional justification can be articulated to permit the retention of those excess funds by the “property-rich” municipalities. Consequently, HB 616 violates Part II, Article 5 of the New Hampshire Constitution.

Equal Protection

Finally, the petitioners argue that permitting the “property-rich” municipalities to retain all the funds raised by SEET in their municipalities is in violation of the equal protection clause, Part I, Articles 2 and 12 of the New Hampshire Constitution. The petitioners maintain that by allowing the majority of the “property-rich” municipalities to retain the funds raised by the SEET, the Legislature has created a wealth-based classification of “property-rich” municipalities that does not serve HB 616’s stated purpose.

As discussed above, the Court has already determined that the provisions of HB 616 violate Part II, Article 5 of the New Hampshire Constitution because the SEET tax imposed is not uniform in rate among municipalities. Therefore, the Court finds it is not necessary or expedient to consider the petitioners’ Equal Protection claim and the Court declines to do so.

Conclusion

For the foregoing reasons, the Court finds HB 616 unconstitutional and thus, the petitioners’ Motion for Summary Judgment is GRANTED.

So ordered.

March 8, 2006

WILLIAM J. GROFF,
Presiding Justice